

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GUILIBALDO VARGAS-JARAMILLO

Claimant

VS.

MARRIOTT INTERNATIONAL, INC.

Respondent

AND

**INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA**

Insurance Carrier

Docket No. 241,554

ORDER

The parties appealed the August 1, 2000 Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on January 17, 2001.

APPEARANCES

C. Albert Herdoiza of Kansas City, Kansas, appeared for claimant. Michael H. Stang of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a July 20, 1998 accident and alleged injuries to the back. Persuaded by the opinions from Dr. Edward J. Prostic, the Judge determined that claimant had a 38.5 percent task loss. Averaging that task loss with a 100 percent wage loss, the Judge awarded claimant a 69.25 percent permanent partial general disability. The Judge also ruled that Dr. Fernando Egea's opinions regarding functional impairment and disability would not be considered because his medical expenses were paid as unauthorized medical expense. Further, the Judge found that the parties failed to list in their submission letters that sanctions and penalties were issues to be addressed in the final award and

ruled that claimant's request for penalties for respondent and its insurance carrier's alleged failure to pay temporary total disability benefits should be addressed after a separate hearing.

Claimant contends the Judge erred (1) by not considering Dr. Fernando Egea's opinions concerning functional impairment and disability; (2) by not considering Dr. Vito Carabetta's opinions concerning impairment and disability; (3) by finding that Dr. Prostic's task loss opinion was 38.5 percent rather than 54 percent; (4) by failing to find that respondent and its insurance carrier were responsible for claimant's medical expenses for an October 1998 back surgery; and (5) by failing to order sanctions against respondent and its insurance carrier for failure to pay temporary total disability benefits. Claimant requests the Board to increase the award of permanent partial general disability benefits to 77 percent, order respondent to pay the medical expense from the back surgery, and order the respondent and its insurance carrier to pay penalties for their failure to timely pay the temporary total disability benefits that were granted in a preliminary award.

Respondent and its insurance carrier contend the Judge erred (1) by finding claimant's back problems and October 1998 surgery were caused by the July 20, 1998 accident at work; (2) by finding that claimant had a 100 percent wage loss when claimant allegedly failed to present evidence that he has made a good faith effort to find employment; (3) by awarding claimant 43.86 weeks of temporary total disability benefits; and (4) by considering medical records from Mexico that were introduced without a proper foundation. Respondent and its insurance carrier request the Board to overturn the Award and deny claimant's requests for both benefits and penalties. Respondent and its insurance carrier also request that claimant be ordered to pay all costs that they have incurred in this claim.

The issues before the Board on this appeal are:

1. Are the medical records that were purportedly obtained from Mexico from Doctors Adolfo E. Zepeda Guerrero and Erick Trujillo Barcelo, which claimant's attorney on March 15 and March 21, 2000, forwarded to the Judge with a request that they be admitted as evidence in this claim, part of the evidentiary record?
2. Did the Judge err by not considering the impairment and disability opinions of Dr. Egea because the doctor had allegedly been paid unauthorized medical benefits?
3. Did claimant injure his back while working for respondent on or about July 20, 1998, which resulted in either permanent injury and/or the October 1998 lumbar disk surgery?
4. If so, what is the nature and extent of claimant's injury and disability?
5. For what period, if any, is claimant entitled to receive temporary total disability benefits?

6. Did respondent refuse or neglect to provide medical treatment to claimant before the October 1998 surgery, making respondent and its insurance carrier liable for payment of that medical expense?

7. Did the Judge err by directing claimant to pursue penalties for the failure to pay preliminary hearing benefits in a separate hearing?

FINDINGS OF FACT

After reviewing the entire file, the Board finds:

1. At the time of the regular hearing, claimant was 53 years old. Claimant attended six years of school in Mexico and speaks very little English. Throughout his life, claimant has performed primarily manual labor.

2. Claimant alleges that he injured his low back on July 20, 1998, when he was pulling tangled sheets from a washing machine. Claimant alleges that he hit his low back on a bin after the tangled sheets came loose. Respondent and its insurance carrier do not contest that claimant hit his low back on the bin and sustained a blunt trauma. But they do contest that the incident permanently injured claimant's back or that it resulted in the back surgery that claimant underwent in Mexico several months later.

3. Claimant immediately reported the accident to his supervisors and was offered, but refused, medical treatment. Rather than seeking treatment, claimant began wearing a back brace and began taking Doan's pills for his back pain.

4. Despite ongoing back pain, claimant continued to work through approximately July 31, 1998, when he flew to California to handle some immigration matters for his son. That trip had been planned for several months. While in California, claimant had also planned to seek employment at a Marriott Hotel and hoped to transfer his employment from respondent to the new hotel.

5. Respondent's human resources director, Alan Tuttle, knew claimant was having symptoms as he continued to work following the accident. In the days following the accident, Mr. Tuttle offered claimant medical treatment on several different occasions. And claimant rejected each offer.

6. Once in California, claimant's symptoms worsened. The record is not entirely clear but the Board finds that claimant sought medical treatment in California for his back and radiating symptoms into his leg by either late August or early September 1998. Claimant obtained some injections from an unidentified doctor in Azusa, California, and when those did not resolve his symptoms, he then sought treatment across the border in Tijuana, Mexico. The Board is aware that claimant testified at the March 1999 preliminary hearing that he first sought medical treatment after leaving Kansas the first few days of October

1998, but the greater weight of the evidence indicates that claimant misspoke and that it is more likely than not that claimant was receiving medical treatment during the month of September.¹

7. The physicians that claimant consulted in Mexico determined that claimant had a herniated disk and recommended surgery. After learning that he needed surgery, claimant spoke with Mr. Tuttle. In that conversation, which occurred on approximately October 14, 1998, claimant advised that he needed prompt surgery and inquired what respondent would do about it. Therefore, by October 14, 1998, respondent had knowledge that claimant was in need of medical treatment, including surgery, for his back.

8. On October 17, 1998, claimant had back surgery in Mexico. As soon as his medical condition permitted, claimant returned to Kansas in January 1999, providing respondent with documentation of his medical treatment and requesting payment.

9. Claimant then initiated this claim. Following a March 1999 preliminary hearing, respondent and its insurance carrier selected orthopedic surgeon Edward J. Prostic, M.D., to evaluate and treat claimant. Dr. Prostic first saw claimant on April 16, 1999, and provided treatment through August 18, 1999.

10. During treatment, Dr. Prostic ordered an MRI, which showed epidural fibrosis at L4-5 but no recurrence of disk herniation. The doctor determined that claimant had a 20 percent whole body functional impairment per the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides).

11. Considering a list of claimant's former work tasks that had been prepared by vocational rehabilitation expert Michael J. Dreiling, the doctor also determined that claimant has lost the ability to do eight of 13 of the tasks that claimant had performed in the 15-year period before the July 20, 1998 accident. On direct examination, Dr. Prostic initially identified six job tasks that claimant could not perform within his permanent work restrictions and limitations. Those tasks were (1) loading/unloading mower from truck; (2) mowing 20 to 25 yards daily; (3) hand digging trenches for water irrigation systems; (4) packing parts into boxes and loading boxes onto pallets; (5) picking up laundry off the floor and separating it into carts; and (6) loading laundry into the washer, the dryer, and taking it out. Later, the doctor also stated that claimant could not perform two additional job tasks, identified as (7) feeding sheets, tablecloths, and napkins into folding/pressing machine and (8) stacking clean laundry items onto carts. Therefore, according to Dr. Prostic, claimant is unable to perform eight out of 13 job tasks, or approximately 62 percent.

12. Dr. Prostic explained how individuals could injure their back and continue working for several days, as follows:

¹ See pages 42 through 49 of the Regular Hearing deposition taken February 4, 2000.

Herniation of lumbar disk and production of sciatica sometimes is a gradual event rather than a sudden event. And so some people start off with back pain and gradually have worsening of the back pain and leg pain and the emergence of leg pain. It is not impossible that this patient started out with what was thought to be a bad back strain and gradually developed an obvious herniated lumbar disk syndrome without substantial additional trauma. The converse is also true, that there may have been some substantial additional trauma that was not reported to me that may have contributed to the problem.²

According to Dr. Prostic, it is not uncommon for people to have a herniated disk without immediate radicular problems. Based upon the history obtained from claimant, the doctor believes that claimant's July 20, 1998 accident at work caused a herniated lumbar disk. The doctor assumes the injury occurred when claimant yanked on the sheets rather than bumping his back. But, according to the doctor, either event had the potential of herniating the disk.

13. Pursuant to his attorney's request, claimant was evaluated by Vito J. Carabetta, M.D., who is board certified in physical medicine and rehabilitation. Dr. Carabetta, who is fluent in Spanish, examined claimant on October 14, 1999, and, utilizing the fourth edition of the *AMA Guides*, determined that claimant had a 20 percent whole body functional impairment. Dr. Carabetta found claimant's symptoms very distinctly follow the L5 nerve root, which the doctor believes is still compromised. The doctor attributes the functional impairment to the July 20, 1998 work-related incident, which the doctor was told occurred while claimant was doing a lot of bending and reaching inside a large washer and pulling on a tangled sheet. The doctor also reviewed Mr. Dreiling's report regarding claimant's former work tasks and agreed with the report that claimant had a 77 percent task loss.

14. According to Dr. Carabetta, it is not necessarily significant that claimant may have later developed numbness in his left leg as that is just an evolution of symptoms. According to the history obtained by the doctor, claimant had an immediate onset of low back pain and left sciatica. Dr. Carabetta knows from experience that someone can continue working with a back injury for several days as the doctor worked for 10 days thinking he had a minor sprain when x-rays later showed that he had a fractured vertebra.

15. At his attorney's request, claimant also saw Fernando M. Egea, M.D., who practices neurology and psychiatry. Dr. Egea saw claimant on two occasions – February 10, 1999, and February 3, 2000. The doctor is bilingual and can easily read Spanish. After reviewing claimant's treatment records from Mexico, the doctor stated that such treatment was reasonable and necessary. According to the doctor, claimant's treatment records

² Deposition of Edward J. Prostic, M.D., February 29, 2000; p. 19.

confirm that claimant was having problems from July through the October 1998 back surgery.

16. Dr. Egea diagnosed claimant as having lumbar radiculopathy, status post-lumbar laminectomy with chronic pain, limited range of motion in the back, and loss of segmental integrity of the lumbar spine, all of which the doctor attributes to the July 20, 1998 incident at work. The doctor believes the injury actually occurred while claimant was pulling on the tangled sheets rather than bumping his back against the cart or bin. Using the fourth edition of the *AMA Guides*, the doctor rated claimant as having a 25 percent whole body functional impairment. Considering claimant's work history, education, and inability to speak English, the doctor believed claimant was essentially and realistically unemployable.

17. Respondent and its insurance carrier's attorney referred claimant to orthopedic surgeon Jeffrey T. MacMillan, M.D., who examined and evaluated claimant on February 4, 2000. As Dr. MacMillan is not fluent in Spanish, the doctor needed an interpreter. The doctor indicated that if after the July 20, 1998 incident claimant (1) worked without accommodations, (2) was not in visible pain, (3) performed his duties without problems, and (4) declined all offers of medical treatment, then the July accident was very unlikely related to claimant's current condition. The doctor testified that progressively worsening symptoms were not consistent with an acute injury and that 60 percent of the people who sustain such injuries should be better in three months and 90 percent better in one year. Dr. MacMillan testified that the disk herniations shown in the MRI taken in Mexico are likely the result of degenerative changes in claimant's spine and that those herniations have probably been there for many years as they probably occurred in the 1970s or 1980s. According to the doctor, an acute disk herniation in a 50-year-old is an extremely rare event and an acute exacerbation of a herniated disk is more likely. Dr. MacMillan did not rate claimant as the extent of impairment depended upon the results of an EMG to verify radiculopathy.

18. Considering the entire record, including the difficulties created by the language problems, the Board finds that claimant did injure his back while working for respondent on July 20, 1998, and that such injury was the direct cause of the symptoms that grew progressively worse after claimant left for California. The Board finds and concludes that the greater weight of the evidence establishes that claimant sought medical treatment for his back and leg symptoms as early as August or September 1998 and that he then underwent surgery in October 1998 after obtaining little, if any, relief from conservative treatment, including spinal injections. The Board finds that claimant has a 20 percent whole body functional impairment and has lost the ability to perform 62 percent of the work tasks that he performed in the 15 years before July 20, 1998. Those percentages are based upon Dr. Prostin's opinions.

19. On March 15 and March 21, 2000, claimant's attorney forwarded to Judge Foerschler medical records from Doctors Adolfo E. Zepeda Guerrero and Erick Trujillo Barcelo. Respondent and its insurance carrier timely objected to those records being

admitted into the evidentiary record. At no time did claimant present the testimony from either the purported authors of the records or a records custodian to establish the authenticity or worthiness of the documents for being admitted into the evidentiary record.

20. In the stipulations section of the August 1, 2000 Award, the Judge noted that \$350 in unauthorized medical expenses had been paid to Dr. Vito Carabetta. But at page 11 of the August 1, 2000 Award, the Judge stated that “at the prehearing settlement conference, it was advised that unauthorized medical expense was used to pay Dr. Egea’s services.” Further, at the January 25, 2000 regular hearing, respondent and its insurance carrier’s attorney announced that they had paid \$375 for unauthorized medical services to Dr. Carabetta.³ Claimant’s submission letter to the Judge listed “[u]nauthorized Medical of Dr. Fernando Egea in the amount of \$325.00” as an issue presented for determination. The list of stipulations in respondent and its insurance carrier’s submission letter included “[u]nauthorized medical benefits paid to date total \$375 (for treatment by Dr. Carabetta).” At oral argument before the Board, the parties’ counsel were unable to clarify the confusion as to whom the unauthorized medical benefits were paid. The Board concludes the record fails to establish which doctor or doctors were paid unauthorized medical benefits and the nature of the services for which those benefits were paid.

21. Claimant’s testimony is uncontroverted that he has looked for work since his surgery and has contacted more than two potential employers per week in attempting to obtain other employment. Claimant also testified that he is a legal resident of the United States and has a social security number. Despite his efforts to find work, claimant remained unemployed in February 2000 when he last testified in this claim.

CONCLUSIONS OF LAW

1. The Board affirms the Judge’s finding that on July 20, 1998, claimant sustained personal injury by accident arising out of and in the course of employment with respondent. The Board also affirms the Judge’s finding that claimant sustained permanent injury as a result of the accident and, therefore, claimant is entitled to receive permanent partial general disability benefits. But the Judge misconstrued Dr. Prostin’s testimony regarding task loss and, therefore, the appropriate task loss is 62 percent rather than 38.5 percent, which increases the permanent partial general disability to 81 percent, as set forth below.

2. The medical records that claimant purportedly obtained from Mexico from Doctors Adolfo E. Zepeda Guerrero and Erick Trujillo Barcelo that claimant’s attorney forwarded to Judge Foerschler on March 15 and March 21, 2000, are not part of the evidentiary record as claimant failed to establish a foundation for their admission.

³ Regular Hearing, January 25, 2000; p. 7.

But medical records from other physicians and health care providers that have not been admitted into evidence may be considered by medical experts in forming their own opinions.

K.S.A. 44-519 does not limit the information a testifying physician or surgeon may consider in rendering his or her opinion as to the condition of an injured employee.⁴

K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians as long as the testifying physician is expressing his or her own opinion rather than the opinion of the absent physician.⁵

Although medical experts may rely upon the reports of nontestifying physicians in forming opinions, those experts may be cross-examined about the basis for their own medical opinions and may be questioned about their assessment of the reliability of the data and the opinions they have utilized.⁶

Therefore, although the documents purportedly from Mexico are not admissible and not part of the evidentiary record upon which the fact finder can base its findings, the documents may be considered by the medical experts in forming their opinions.

3. The Workers Compensation Act provides that an injured worker is entitled to \$500 of unauthorized medical benefits, which is limited to the payment for examinations, diagnosis, or treatment. If the money is used to obtain a functional impairment rating, that medical opinion is not admissible. The Act reads:

Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.⁷

⁴ *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, syl. 2, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989).

⁵ *Boeing Military Airplane Co. v. Enloe*, *supra*, syl. 3.

⁶ *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997).

⁷ K.S.A. 1998 Supp. 44-510(c)(2).

Because the record fails to disclose that the unauthorized medical expense paid by respondent and its insurance carrier was used to obtain a functional impairment rating in violation of the above-quoted statute, both the testimony and reports from Dr. Egea are admissible and part of the record in this claim.

4. Claimant's back injury is compensable as an unscheduled injury using the formula set forth in K.S.A. 1998 Supp. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*⁸ and *Copeland*.⁹ In *Foulk*, the Court held that a worker could not avoid the presumption against a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . . (*Copeland*, p. 320.)

5. Based upon claimant's uncontroverted testimony that he is seeking employment by making at least two contacts per week with potential employers, the Board finds that

⁸ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁹ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

claimant is making a good faith effort to find appropriate employment. Therefore, claimant's actual wage loss should be used for determining permanent partial general disability. Averaging the 100 percent wage loss with claimant's 62 percent task loss creates an 81 percent permanent partial general disability.

6. Claimant is entitled to receive temporary total disability benefits for the period that he was unable to work.¹⁰ Claimant underwent back surgery on approximately October 17, 1998, and afterwards returned to Kansas where he obtained authorized medical treatment from Dr. Prostic through August 18, 1999. The Board concludes that claimant was unable to work through that period and, therefore, is entitled to receive 43.71 weeks of temporary total disability benefits.

7. The Workers Compensation Act requires employers to provide medical treatment as is reasonably necessary to cure and relieve the effects of a worker's injuries.¹¹ If the employer knows of the injury and neglects to provide medical treatment, the injured worker may obtain treatment at the employer's expense. The Act reads, in part:

. . . If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this section, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.¹²

On approximately October 14, 1998, respondent learned that claimant needed medical treatment for his back, including immediate surgery. Despite that knowledge, respondent failed and neglected to provide claimant authorized medical treatment. Therefore, the Board concludes that respondent and its insurance carrier are liable for the medical treatment rendered claimant after October 14, 1998, which includes among other things the back surgery and follow-up treatment that claimant received in Mexico.

8. In the Award, the Judge ruled that claimant's request for penalties should be addressed after an additional hearing in which the parties could focus on that issue alone. The Judge noted that the parties had failed to designate penalties as an issue in their submission letters. The Workers Compensation Act permits an injured worker to seek penalties when an employer fails to pay the compensation awarded.¹³ There is nothing in the Act that requires a judge to address penalties in a final award. Generally, the Board

¹⁰ K.S.A. 44-510c(b)(2) (Furse 1993).

¹¹ K.S.A. 1998 Supp. 44-510(a).

¹² K.S.A. 1998 Supp. 44-510(b).

¹³ K.S.A. 44-512a (Furse 1993).

will not interfere with judges' discretion in controlling their dockets. The Board affirms the Judge's ruling that the penalties issue should be addressed after an additional hearing.

AWARD

WHEREFORE, the Board modifies the August 1, 2000 Award and increases the permanent partial general disability to 81 percent.

Guilibaldo Vargas-Jaramillo is granted compensation from Marriott International, Inc., and its insurance carrier for a July 20, 1998 accident and resulting disability. Based upon an average weekly wage of \$325.41, Mr. Vargas-Jaramillo is entitled to receive 43.71 weeks of temporary total disability benefits at \$216.95 per week, or \$9,482.88, plus 312.89 weeks of permanent partial disability benefits at \$216.95 per week, or \$67,881.49, for an 81 percent permanent partial general disability, making a total award of \$77,364.37.

As of March 5, 2001, there is due and owing to the claimant 43.71 weeks of temporary total disability compensation at \$216.95 per week, or \$9,482.88, plus 80.71 weeks of permanent partial general disability compensation at \$216.95 per week, or \$17,510.03, for a total due and owing of \$26,992.91, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$50,371.46 shall be paid at \$216.95 per week until paid or until further order of the Director.

Medical benefits are granted as provided in paragraph 7 of the Conclusions of Law. Additionally, claimant may apply to the Director for future medical benefits. Finally, claimant is entitled to receive up to \$500 for unauthorized medical benefits upon presenting proof of payment.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
 Michael H. Stang, Overland Park, KS
 Robert H. Foerschler, Administrative Law Judge
 Philip S. Harness, Director